

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

HECTOR EMILIO FERNANDEZ-ROSA,
Defendant.

No. 12-cr-894-2 (RJS)
No. 23-cv-1973 (RJS)
No. 23-cv-544 (RJS)
ORDER

HECTOR EMILIO FERNANDEZ-ROSA,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

RICHARD J. SULLIVAN, Circuit Judge:

Hector Emilio Fernandez-Rosa, currently incarcerated and proceeding pro se, moves under 28 U.S.C. § 2255 to vacate or set aside his 2019 conviction and sentence following his guilty plea to one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. By order dated January 30, 2023 (Dkt. No. 12-cr-894-2, Doc. No. 94), the Court ordered Fernandez-Rosa to file a declaration by March 30, 2023 to show cause as to why his section-2255 motion – which purported to be dated October 30, 2022 but which was not received by the Court until January 19, 2023 (Dkt. No. 12-cr-894-2, Doc. No. 93; Dkt. No. 23-cv-544, Doc. No. 1) – should not be denied as time-barred.

On March 6, 2023, the Court received a duplicative motion under 28 U.S.C. § 2255, which was purportedly dated August 29, 2022, bearing Fernandez-Rosa's signature. (Dkt. No. 23-cv-1973, Doc. No. 1.) Thereafter, Fernandez-Rosa submitted a declaration – dated March 28, 2023,

but not received by the Court until April 5, 2023 – asserting that he placed his initial motion into the prison mail system on August 29, 2022. (Dkt. No. 12-cr-894-2, Doc. No. 99.) Fernandez-Rosa also asserted that staff members at his facility “rejected the mail” containing his initial section-2255 motion, prompting him to submit another motion into the prison mail system on October 30, 2022. (*Id.*)

It bears noting that, if the motions were put into the prison mail system on the dates Fernandez-Rosa claims they were, the motions would be timely since Fernandez-Rosa had until November 1, 2022 to submit a motion to vacate under section 2255.¹ Nevertheless, given the self-serving nature of Fernandez-Rosa’s assertions and the significant delays between when Fernandez-Rosa claims to have mailed his motions and when they were actually received in the Clerk’s Office, the Court remains concerned that the motions may be time-barred. For these reasons, the Court requests further documentation from the parties to assess whether a hearing will be necessary to determine the timeliness of Fernandez-Rosa’s motion.

Accordingly, IT IS HEREBY ORDERED THAT Fernandez-Rosa shall file with the Court, by July 17, 2023, documents and witness affidavits pertaining to when and how he mailed his motions. IT IS FURTHER ORDERED THAT the government shall file its response to Fernandez-Rosa’s submissions within ten days of the filing of those materials. All further papers filed or submitted for filing must include the criminal docket number and will be docketed in the criminal case – 12-cr-894 (RJS).

¹ In a previous order (Dkt. No. 12-cr-894-2, Doc. No. 94), the Court stated that Fernandez-Rosa had until September 1, 2022 to file a timely section-2255 motion. The actual deadline, however, is November 1, 2022, in light of an order issued by the United States Supreme Court during the COVID-19 pandemic, which temporarily extended the time to petition for certiorari from 90 to 150 days. *See* 334 F.R.D. 804. Under the “prison mailbox” rule, documents submitted by incarcerated individuals are generally deemed to be filed on the date that they are delivered to prison authorities for mailing. *See Noble v. Kelly*, 246 F.3d 93, 97–98 (2d Cir. 2001).

The Clerk of Court is respectfully directed to mail a copy of this Order to Hector Emilio Fernandez-Rosa, BOP ID # 92339-054, at either USP Terre Haute, P.O. Box 33, Terre Haute, IN 47808, or at any BOP institution to which Fernandez-Rosa should be subsequently transferred.

SO ORDERED.

Dated: May 16, 2023
New York, New York

A handwritten signature in blue ink, appearing to read 'R. Sullivan', is written over a horizontal line.

RICHARD J. SULLIVAN
UNITED STATES CIRCUIT JUDGE
Sitting by Designation